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In the Supreme Court of the United States

OCTOBER TERM, 1976

A. LASAPONARA & SONS, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 541 F. 2d 992. The decision and order of the National Labor Relations Board (Pet. App. 15a-21a) and the decision of the Administrative Law Judge (Pet. App. 22a-64a) are reported at 218 N.L.R.B. 1096.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1976. The petition for a writ of certiorari was filed on December 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's findings that petitioners discharged certain employees for having engaged in concerted activity protected by the National Labor Relations Act.

2. (a) Whether petitioners failed to preserve their right to obtain judicial review of that portion of the Board's order requiring petitioners to recognize and bargain with the Union.

(b) Whether, in any event, the Board's order was proper in the circumstances of this case.

STATUTES INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are set forth at Pet. 2-4.

STATEMENT

1. Petitioner A. Lasaponara & Sons, Inc. (the "Company"), manufactures and distributes on a wholesale basis cheese and related products (Pet. App. 1a; A. 4-5, 114).[1] In the autumn of 1973, a majority of the employees in an appropriate unit at the Company's Oriskany, New York, plant signed cards authorizing the Mechanics Educational Society of America, AFL-CIO (the "Union"), to act as their representative for collective bargaining purposes (Pet. App. 1a; A. 6, 52). On December 3, 1973, the Union wrote to the president of the Company and requested a meeting to begin negotiations on a collective agreement. On December 5, the Union filed with the Board a petition for a representation election (Pet. App. 2a; A. 6-7, 53, 58-59, 154, 156).

[1] "A." refers to the parties' printed appendix in the court of appeals. We are lodging a copy of this appendix with this Court.

On December 12, 1973, officials of the Union met with Company representatives, including Company president and co-owner Joseph Lasaponara. Lasaponara stated at that meeting that he had no objection to the Union, but was concerned that a Board election at that time could affect production and upset pending merger negotiations. The Union's officials suggested that those problems could be avoided if the Company were prepared voluntarily to recognize the Union as its employees' exclusive bargaining agent on the strength of the authorization cards (Pet. App. 2a-3a; A. 8-9, 60-61, 75). Two days later, Lasaponara again met with the Union officials and agreed to recognize the Union, grant an immediate 20-cent per hour wage increase, and continue existing employee benefits. In return, the Union agreed to withdraw its election petition and to delay contract bargaining until April 1, 1974, the date by which it was expected that the merger negotiations would be completed. The parties also agreed to put the recognition agreement in writing (Pet. App. 3a; A. 9-11, 61-62, 75-77).

All the elements of the December 14 agreement were carried out by the parties, except that Lasaponara failed to sign the written memorandum of recognition that the Union presented to plant manager and co-owner Anthony Fazzino on December 20, 1973, for transmittal to Lasaponara. When Union official James DeBella asked Fazzino in January 1974 about Lasaponara's failure to sign, Fazzino blamed it on the holidays; in February 1974, in response to DeBella's further inquiry, Fazzino stated that Lasaponara had a very busy schedule. Despite the absence of a signed agreement, the Union dealt with Company officials about employee grievances through the winter (Pet. App. 4a; A. 9 n. 9, 12-13, 63-64, 67, 77-80, 89, 126-127, 159-161).

In the meantime, Lasaponara's merger negotiations with ERE Industries, Inc. ("ERE"), continued and an agreement was reached. On March 27, 1974, Frank Oddi, president of

ERE, who was slated to become president of the Company as well,[2] met with the Company's employees and informed them that the employee benefits in effect at ERE would be extended to them as well (Pet. App. 5a; A. 15, 53-54, 90-91, 142-143). Union official DeBella, upon learning of Oddi's involvement, telephoned but was unable to reach him; DeBella left a message for Oddi to return the call. Although Oddi knew the call was from the Union, he did not return it (Pet. App. 5a; A. 15, 82-83, 149-150). On May 1, the benefit changes promised by Oddi on March 27 were put into effect (Pet. App. 5a; A. 16, 141-143).

On Friday, April 5, 1974, Union Shop Committee Chairperson Eva Wilson presented a petition to Fazzino requesting that the schedule calling for work on Palm Sunday, two days hence, be rescinded due to the religious nature of the holiday. The petition went on to state that the signers of the petition would not work on Palm Sunday (Pet. App. 10a-11a; A. 24, 56-57, 65, 91, 96-97, 155). Fazzino did not alter the work schedule,[3] and six employees refused to work on Palm Sunday. All returned to work the following Monday. Two months later, after ERE had acquired its ownership interest,[4] they were discharged on the ground that they had refused to work on Palm Sunday (Pet. App. 11a; A. 25, 28-30, 91-92, 96-97, 103-105, 107).

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[2]Lasaponara had advised Oddi in January 1974 that there had been some union activities at the Company but that they were under control. Moreover, in March 1974, Lasaponara had advised Oddi that the Union was dealing with the Company concerning employee grievances. Oddi told Lasaponara to be careful since he was not authorized to bind ERE without ERE's knowledge (Pet. App. 34a-35a).

[3]Fazzino contacted Oddi, who suggested that he continue operations with those employees who did report for work on Palm Sunday (Pet. App. 49a-50a).

[4]On April 23, 1974, ERE and the Company executed an agreement whereby ERE purchased all of the Company's stock; the former owners, Lasaponara and Fazzino, remained in executive positions (Pet. App. 5a; A. 15, 55, 118, 126).

2. Pursuant to charges filed by the Union, the Board found that the Company orally had recognized the Union in December 1973, at which time it had been designated by a majority of the employees in an appropriate unit as their collective bargaining representative; that the employing entity remained the same notwithstanding the sale of the Company to ERE; and that the Company therefore had violated Section 8(a)(5) and (1) of the Act by ignoring the Union's request for bargaining and by making unilateral changes in terms and conditions of employment (Pet. App. 37a-38a, 57a). The Board further found that the Palm Sunday strike was concerted activity protected by the Act and that the Company and ERE had violated Section 8(a)(1) of the Act by discharging the strikers (Pet. App. 52a-53a, 56a). The Board ordered the Company and ERE, *inter alia*, to bargain with the Union and to reinstate the discharged strikers with back pay (Pet. App. 16a-17a, 57a-61a).[5]

The court of appeals sustained the Board's findings and enforced its order (Pet. App. 1a-14a).[6]

ARGUMENT

1. Contrary to petitioners' contention (Pet. 8-13), the court of appeals' holding that the strike or work stoppage on

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[5]The Board also found that the Company had interrogated employees in a coercive manner and had threatened employees, in violation of Section 8(a)(1) of the Act, and that both the Company and ERE had violated Section 8(a)(3) and (1) by failing to rehire another employee because of his union activity (Pet. App. 40a-44a, 48a-49a, 56a). These findings, sustained by the court of appeals (Pet. App. 8a-10a, 13a-14a), are not challenged in this proceeding.

[6]In finding that the Palm Sunday strikers' activity was protected, the court of appeals found it unnecessary to reach the propriety of the Board's further finding that petitioners' two-month delay in acting against the strikers constituted condonation of the strike (Pet. App. 13a n. 11).

Palm Sunday was concerted activity, protected by Section 7 of the Act, is in accord with settled authority. See, *e.g.*, *National Labor Relations Board* v. *Leprino Cheese Co.*, 424 F. 2d 184 (C.A. 10), certiorari denied, 400 U.S. 915; *National Labor Relations Board* v. *Morris Fishman and Sons, Inc.*, 278 F. 2d 792 (C.A. 3); *National Labor Relations Board* v. *M & M Bakeries, Inc.*, 271 F. 2d 602 (C.A. 1). As the court of appeals stated (Pet. App. 11a-12a; citations omitted):

> The one day strike or work stoppage by the discharged employees in support of their petition protesting the Palm Sunday schedule is statutorily protected because it constituted concerted activity aimed at changing working conditions at the plant. • • • While the strike undoubtedly brought inconvenience and economic loss to the Company in view of its unusually heavy production schedule due to the Easter season, such a result is obviously the very object of any concerted employee action protected by the Act.

The cases relied on by petitioners are not to the contrary. *National Labor Relations Board* v. *Marshall Car Wheel and Foundry Co.*, 218 F. 2d 409 (C.A. 5), *National Labor Relations Board* v. *Reynolds & Manley Lumber Co.*, 212 F. 2d 155 (C.A. 5), and *United States Steel Co.* v. *National Labor Relations Board*, 196 F. 2d 459 (C.A. 7), all involved situations in which the timing of the walkouts created severe danger to the employer's physical plant. Here, by contrast, th only "danger" was loss of production—a result that is inherent in any strike. The fact that the work stoppage occurred during the holiday season, and thus may have increased the sales loss, did not make the activity unprotected. See *National Labor Relations Board* v. *Leprino Cheese Co., supra*, 424 F. 2d at 186-187.

Dobbs Houses, Inc. v. *National Labor Relations Board*, 325 F. 2d 531 (C.A. 5), and *American Art Clay Co.* v. *National Labor Relations Board*, 328 F. 2d 88 (C.A. 7), both involved strikes to protest the employer's choice of supervisors, a subject which is not as clearly within the protection of Section 7 of the Act as is the work scheduling controversy at issue here. Moreover, in *Dobbs Houses*, the strike of restaurant waitresses was called on the spur of the moment, at the height of the dinner period (325 F. 2d at 539). Here, two-days' notice was given by the employees, thus enabling the Company to make alternative arrangements.[7]

2.(a) The Board also found, and the court of appeals agreed, that petitioners had violated Section 8(a)(5) and (1) of the Act by reneging on an agreement to recognize the Union, which represented a majority of the Company's employees in an appropriate unit, and by making unilateral changes in employment conditions. Petitioners now contend (Pet. 13-17) that the court of appeals "overlooked" distinctions between the present case and *National Labor Relations Board* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 279, in imposing a bargaining obligation on the Company's "successor," ERE Industries. But petitioners did not raise that issue in the court of appeals; petitioners there merely challenged the propriety of the Board's factual finding that the Company unequivocally had recognized the Union in December 1973 (see Pet. App.

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[7]The decision below also is consistent with the statement in *Shelly & Anderson Furniture Mfg. Co.* v. *National Labor Relations Board*, 497 F. 2d 1200, 1203 (C.A. 9), that, "in order to be protected the employee must choose either to be on the job and subject to the employer's rules or to be off the job and bear the commensurate economic burden." Here, the employees chose the latter course.

6a-7a).[8] Consequently, there is no occasion for this Court to consider the successorship issue. *E.g., Neely* v. *Eby Construction Co.*, 386 U.S. 317, 330; *Lawn* v. *United States*, 355 U.S. 339, 362-363 n. 16.

(b) In any event, the Board's bargaining order was proper. The Board found that the transaction between the Company and ERE did not change the nature of the employing entity (Pet. App. 38a). Although the Company became a wholly owned subsidiary of ERE and Frank Oddi, president of ERE, also became president of the Company, the Company continued to operate as before, with the same employees and with Joseph Lasaponara and Anthony Fazzino remaining as principal operating officials. In these circumstances, the Board correctly concluded that the bargaining obligation that the Company owed to the Union was not extinguished when the Company became a subsidiary of ERE.[9] Furthermore, since Oddi, who was president of ERE and became president of the Company, was largely responsible for the unilateral changes which

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[8]Indeed, petitioners expressly stated in their brief in the court of appeals (p. 2) that "this case raises no successorship issues" (citing *National Labor Relations Board* v. *Burns International Security Services, Inc., supra*).

[9]Contrary to petitioners' contention (Pet. 15-16), nothing in *National Labor Relations Board* v. *Burns International Security Services, Inc., supra*, indicates that a voluntarily recognized union is entitled to less consideration in a successorship situation than a union certified following a Board election. See *National Labor Relations Board* v. *Foodway of El Paso*, 496 F. 2d 117, 120 (C.A. 5); *National Labor Relations Board* v. *Bachrodt Chevrolet Co.*, 468 F. 2d 963, 968 (C.A. 7), remanded, 411 U.S. 912, reaffirmed May 8, 1975 (unpublished order), 515 F. 2d 512, certiorari denied, No. 75-261, November 3, 1976.

sought to undermine the Union,[10] the Board was justified in making its bargaining order applicable to ERE.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10]While the Board did not specifically find that Oddi was aware of the Company's oral agreement to recognize the Union (see Pet. 5-6), the record shows that Joseph Lasaponara apprised Oddi of the status of union activity at the Company (see discussion at page 4, *supra*).